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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1476

J. BRIAN GAFFNEY, *Appellant*

v.

THEODORE R. CUMMINGS, ET AL., NANCY ARONIE, ET AL., and THOMAS J. MESKILL, Governor of the State of Connecticut, ET AL., *Appellees*

Appeal from the United States District Court for the District of Connecticut

REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

SUMMARY

Certain conceptual and factual aspects of Brief for Appellees justify the filing of this Reply Brief which may be summarized as follows. We start in all constitutional litigation with a presumption of constitutionality, and plaintiffs' initial burden to show an injury before the question of justifications is reached.

In reapportionment insignificant population deviations of the Connecticut type are within the level of presumptive constitutionality contemplated by *Swann* v. *Adams*. The political fairness principle used in Connecticut districting is reached only if plaintiffs show colorable dilution of voting power. When reached, this principle supports the Connecticut plan both by justifying deviations if justification be needed, and by testifying to the overall fairness of the construction of the plan—a plan which in this instance has produced fair results in its first use.

ARGUMENT

I. CONTRARY TO APPELLEES' ASSERTION OF AN "ORIGINAL SIN" QUALITY FOR REAPPORTIONMENT PLANS, SWANN v. ADAMS DIRECTLY CONTEMPLATES LEVELS OF PRESUMPTIVE CONSTITUTIONALITY FOR POST-REYNOLDS REAPPORTIONMENTS

A. "Vote Dilution" and Plaintiff Burden of Proof

An initial restatement of elementals is necessary because on quick perusal of the briefs one might wonder whether opposing counsel were talking of the same case. Appellees' brief misconceives the nature of constitutional litigation, with its basis always in plaintiff demonstration of colorable constitutional injury. It misconceives the meaning of *Swann* v. *Adams*, the most recent relevant case for the constitutional issues raised in the Connecticut litigation.[1] It misconceives the hoary term "gerrymander", so that even an attempt to be politically fair—with resultant actual fairness not even seriously questioned—somehow becomes a gerrymander per se.[2]

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[1] Brief for Appellees, p. 19.

[2] Brief for Appellees, p. 47.

Vote dilution, a term which is part of the lingua franca of reapportionment litigation,[3] simply identifies the perennial problem in all legislative elections of "achieving of fair and effective representation for all citizens." *Reynolds* v. *Sims,* 377 U.S. 533, 565-66 (1964).

Some voters may face an unfair allocation in the number of seats assigned to their area. Vote dilution results because their reach is too short, however tight their grasp. This was vintage vote dilution in the era of *Baker* and *Reynolds.* Other voters of a given persuasion may face political imbalance in the series of equalized population districts in which they dwell. Vote dilution results because however equal their reach they have no grasp. This is vintage vote dilution of the 1970's, else we would have no apportionment plan challengers and no apportionment plan defenders. No one fights over a percentage point or two, although percentage points may be "good" reasons in some forums to reach real political objectives.

Plaintiffs argue that *no* presumption of constitutionality attaches to state reapportionment plans because of the "compelling state interest" rationale which this Court has applied to certain constitutionally protected interests. Brief for Appellees, p. 20-22. This argument is a *non-sequitur.* Compelling justification and its rational basis counterpart are standards of equal protection review which come into play only *after* a differential treatment is shown to result from a challenged classification. Unless plaintiff sustains the

[3] "The right to vote can be affected by a *dilution of voting power* as well as by absolute prohibition on casting a ballot." *Allen* v. *State Board of Elections,* 393 U.S. 544, 569 (1969) (Emphasis added).

initial burden of demonstrating such substantive injury, the presumption of constitutionality upholds the state action in question.

We are not dealing in reapportionment cases with instances of denial of the vote per se.[4] We are dealing with the weight of a vote in a legislative district system, *viz.*, with its effectiveness in political terms, in short, its power. Gross regional voting power dilution was accorded in *Reynolds* a kind of per se quality of unconstitutionality. Such voting power dilution disappears when population deviations are reduced to a low point, and a plaintiff's prima facie case based on numbers alone likewise disappears. This is the message of *Swann* v. *Adams,* 385 U.S. 440 (1967).

Although large population disparities have evaporated, population demographic features can be arranged to maintain voting power dilution. It is a game both sides can play. The most adroit way to achieve plaintiff-oriented "effective representation" is to unhorse a laboriously constructed official state plan by simply proffering another plan marginally tighter in equal population terms. The court immediately invalidates the "unequal" official plan and adopts the plaintiff's self-serving plan, unexamined, as the "constitutional" plan for use in the imminent election.

Experience now points the way for articulation of more refined rules of constitutional litigation in re-

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[4] Where state action totally excludes a class of voters, the prima facie case (substantive injury) under the Fourteenth Amendment is merely the existence of the classification. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972); Kramer v. Union Free School District, 395 U.S. 621 (1969); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

apportionment, responsive to both equal protection and forgotten due process values.[5] The Connecticut case can help to point the way toward regularizing the significant judicial concern with voting power dilution.

B. The Presumptive Constitutionality Concept Is Embraced in Swann v. Adams.

Effective management of arithmetic elements of reapportionment litigation requires articulation of rules which with reasonable clarity will: (1) require challengers to articulate a prima facie case in terms of colorable constitutional injury (thus isolating the litigable issue and protecting both state and federal courts from casual intrusions into the political process); (2) illuminate the justificatory burden on the party defending the official plan once challenger has crossed the threshold of articulating such injury; (3) identify the level of conclusive constitutional violation.

In *Swann* v. *Adams,* 385 U.S. 440 (1967) and *Kilgarlin* v. *Hill,* 386 U.S. 120 (1967), this Court took a significant step in this direction. In the course of invalidating a Florida plan in which the most deviant senate and house districts were 15.09 per cent and 18.28 per

[5] If courts hurriedly adopt a belated plaintiff plan (or master's or court-made plan) and a stay is denied, there is a double erosion of due process values. First, the plan to be used is adopted without opportunity for plenary hearing, or perhaps any hearing. Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187 (1972). Second, appeal is discouraged or made ineffective even if appellant prevails. Assuming reversal and reinstatement of the original plan after an election has been held, even if the "improperly elected" new legislature does not perpetuate itself by enacting a new plan, a judicially-caused political discontinuity results, the effect of which cannot be undone. Mahan v. Howell, No. 71-364, October Term 1972.

cent from ideal, the Court in an opinion by Mr. Justice White said:

> *De minimis* deviations are unavoidable, but variations of 30% among senate districts and 40% among house districts can hardly be deemed *de minimis* and none of our cases suggests that differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable state policy. 385 U.S. at 444.

The essential doctrinal derivation from *Swann* is three-fold. First, where deviations are as large as in the Florida plan (yielding top to bottom variations approaching 30 to 40 per cent), the plan will not be approved without justification.

Second, de minimis deviations are "unavoidable;" being unavoidable there is logically no need for justification. This formulation established one point of presumptive constitutionality in a sort of "rock-bottom" sense. It misconceives *Swann* to conclude that it establishes the sole level of presumptive constitutionality because the informing purpose of reapportionment litigation is to avoid any meaningful dilution of voting power, and not, as approvingly requoted in *Swann* from *Reynolds,* to require "mathematical exactness." 385 U.S. at 444.

Third, between the above-stated outer boundaries is the yet unresolved point where a duty of justification begins, i.e., where challengers have established a prima facie case on arithmetic grounds alone. A duty of justification may begin at a lower level than with "differences of the [Florida] magnitude," *id.,* but not at some "unavoidable" computer level of deviation. We would then be faced with hundreds of "equally equal"

but politically different plans. Brief for Appellant, p. 48.

Consistent with *Swann* a maximum deviation from ideal district population of five or ten per cent may still be within the range of presumptive constitutionality. This conclusion is supported by a later statement of the author of the *Swann* opinion, Mr. Justice White, in the subsequent congressional districting cases, *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), and *Wells* v. *Rockefeller*, 394 U.S. 542 (1969).[6] Connecticut's percentage deviations are a mere 0.9 per cent for the senate and 3.9 per cent for the assembly districts, in each instance the actual "census persons" deviance being fewer than 800 persons.

Furthermore, the flexibility of the *Swann* approach eases critical census data problems—intrinsic census inaccuracies and incongruity between gross census population and voting population. Census data problems are described in appellants' briefs in all three cases being argued concurrently, i.e., the present Connecticut case and the two Texas cases.[7] The plaintiffs in the

[6] Dissenting, Justice White stated that "as a rule of thumb" he would be satisfied with largest to smallest variations of "10 to 15%, i.e., *deviations* from ideal up to 5 or 7½ per cent. 394 U.S. at 553. The comment is especially significant, coming as it does in a congressional districting case, because it has been suggested since the time of *Reynolds* that there may be even more arithmetic leeway in state legislative apportionment than in congressional districting. It is also noteworthy, as further illuminating *Swann*, that in his *Kirkpatrick/Wells* dissent, Justice White used the term "substantially equal" in characterizing the Court's population ground rule for single member districts. *Id.*

[7] Gaffney v. Cummings, No. 71-1476; Bullock v. Weiser, No. 71-1623; Bullock v. Register, No. 72-147. An especially helpful discussion is contained in Appellant's Brief on the Merits in *Weiser*, pp. 25 *et seq.*

present case, Brief for Appellees, pp. 15-17, criticize the raising of these questions but do not rebut any of the data, nor do they perceive the *Reynolds*-based reason for raising these questions.

Equalization of voting power, not a barren numbers game, is the raison d'etre for constitutionally mandating reapportionment. As the Court stated in *Reynolds*:

> ... the right of sufferage can be denied by a debasement or dilution of the *weight* of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. . . .
>
> The Equal Protection Clause demands no less than substantially equal legislative *representation* for all citizens, of all places as well as of all races. — 377 U.S. at 554, 563, 568. (Emphasis added.)

Gross population malapportionment adversely affects voting power. But when population disparities become miniscule the nexus with voting power becomes seriously attenuated, and when census data is pushed beyond its reliability any possible nexus with voting power ceases. Hence it is highly relevant to consider problems with census data in a case like Connecticut where the average legislative district in the State Plan deviates by fewer than 400 "census persons" from ideal, the maximum deviation is under 800, and the median census unit available to work with was 1,000 persons.

The total inappropriateness of a tight "census persons" equality rule as a guarantee against dilution of voting power is a product of several elements: (1) coding and counting inaccuracy per se; (2) undercount of some groups; (3) area differences in proportion of

voting age population to total population;[8] (4) varied growth rates;[9] and (5) area differences in ineligibles such as aliens or institutional population. Voting day disparities between the real population (or voting population) and the census population, caused by the above factors, can far exceed the few hundred "census persons" deviance in the districts in the State Plan for Connecticut. Placed in functional context, the aspect of vote dilution attributable to population deviations vanishes before the "census population" exact equality level is reached. And the aspect of vote dilution, i.e., partisan political arrangements,[10] which is the sole

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[8] The disparities in voting age population for districts of equal population may be significant. For example, although the seventh and ninth congressional districts in Illinois have virtually identical populations, the seventh contains 275,147 eligible voters while the ninth contains 364,054. *Congressional District Data Book* (Districts of the 93d Congress), U.S. Bureau of the Census (1971).

[9] See Speigelman, *Introduction to Demography* 415 (1968); U.S. Bureau of the Census, *The Materials and Methods of Demography* 806 (1971).

In Connecticut between 1960-70, for example, Hartford's population increased by 20.9 percent while New Haven's and Bridgeport's increases were limited to 10.9 and 15.1 per cent, respectively. *Statistical Abstract of the United States, 1971* 19-20. A 1969 reapportionment of Missouri's congressional districts used for the 1970 elections based upon the 1960 census yielded a plan wherein the most populous contained more than 225,000 more people than the least. *Priesler* v. *Secretary of State*, 341 F.Supp. 1158, 1160 (W.D. Mo. 1972).

[10] R. Pennock and J. Chapman, eds., *Representation* (NOMOS X), 1968. A political scientist recently made this comment: "...only the credulous seriously contend that the requirement of numerical equality between representation districts is capable of precluding the manipulation of the districting process for partisan advantage." Pulsipher, "Positive and Normative Theories of Apportionment," paper delivered at Conference on Democratic Representation and Apportionment, New York Academy of Sciences, November 1-3, 1972.

present concern in reapportionment may be worsened by a rule of exact equality in "census persons."[11]

C. The Presumptive Constitutionality Approach Disposes of Cases Like Connecticut, with Trivial Population Deviations, and Forces Challengers to Produce Actual Evidence Regarding Alleged Dilution of Voting Power

We are pleased to associate ourselves with the parallel arguments in the two Texas cases[12] for a rule of presumptive constitutionality keyed to a low level of population deviation. The proposed formulations vary, reflecting the differences in the cases and the appropriateness of a case by case approach, but the underlying constitutional perception is the same.

In the specific context of the Connecticut case, we suggest the following presumptive constitutionality formula:

> Where the census units used to construct a state legislative reapportionment plan are the most refined available and are not so large as to be inherently unsuitable for creating districts of substantially equal population, a state legislative apportionment in which the population of the most deviant district deviates from ideal by no more than the average population of the census units used, the apportionment plan should be presumed constitutional. The plan should be sustained without more, absent a plaintiff's particularized allegation and proof in terms other than such small pop-

[11] "The political appetite of the chief redistricting technician of the Republican Party in New York was whetted by the 1969 decision to emphasize population equality to the exclusion of all other factors. 'Now it's just a matter of slicing the salami,' the New York Times quoted him as saying, 'and the salami happens to be in our hands'." David I. Wells, "The Impact of Gerrymandering." *The American Federationist*, February, 1972, p. 15.

[12] Supra note 7.

ulation deviations, that the plan is intended or will operate in an invidiously discriminatory manner.

Applied to Connecticut the formula identifies not a de minimis constitutional violation but no constitutional violation at all. The Connecticut average deviation is fewer than 400 "census persons," despite the fact that 88 per cent of the census units used as building blocks exceeded 400 population. The percentage deviation derived from the *census* count deviation is a function of the size of the district being constructed, not a function of the census deviation itself. For the Connecticut senate where the ideal district would be 84,228 the 787 maximum body deviation yields a per cent deviation of 0.9. For the lower house where the ideal would be 20,081, the equivalent 789 body deviation raises the per cent deviation to 3.9 solely because the size of the district is smaller. Brief for Appellant, pp. 30-31. Deviations at such a trivial level defy meaningful linkage to dilution of voting power, bearing in mind also that the actual qualified voters affected will be fewer than the census total population figures, or the margin of census inexactness.

The special question of the relevance of *Kirkpatrick* v. *Preisler* and *Wells* v. *Rockefeller* to state legislative apportionment has been dealt with in our main Brief at pages 34-41. If not wholly inapplicable to state legislative districting, the *Kirkpatrick-Wells* precedents can nevertheless be interpreted as consistent with a presumptive constitutionality rule shaped to the special facts of the Connecticut case. We do have miniscule deviations, and instead of the bad faith of *Kirkpatrick*, 394 U.S. at 531-32, we have the highest kind of good faith—a pursuit of the purpose of political fairness.

Further, it is appropriate to raise a question of plaintiff good faith. This point applies not merely to present plaintiffs but to all recent-vintage reapportionment plaintiffs who seek to win by slipping in belatedly for judicial purview a tight equal population plan of their own.[13] In *Gaffney* the numerical difference between the Board plan and the one plaintiff plan tighter than the Board's plan being so marginal (three of the four plaintiff plans were looser than the Board plan), how could the plaintiffs possibly care which plan was adopted in terms of mere arithmetical calculation of "voting power" divorced from partisan considerations?

The answer of course is that calculations of plaintiff political gain or loss provide the underlying motivations for the great effort of litigation. Once this real issue is perceived, it is all the more vital that plaintiffs produce real evidence of alleged dilution of voting power. The solution is to adopt a reasonable rule of presumptive constitutionality. Thereby parties and courts will be freed from unrealistic arithmetic shadowboxing. Reserved for judicial treatment, on a realistic record, will be only those cases where challengers in traditional constitutional litigation fashion disclose the real reasons for their dissatisfaction with the official plan, and their preference for their own belatedly submitted trivially more "equal" plan. To continue in the present path would be to transfer ultimate control of districting not merely from legislative hands to judicial hands, but to private plaintiff hands.

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[13] Plaintiffs' plans were not submitted to the Apportionment Board at all, and were not available for scrutiny by anyone until submitted as exhibits at the one-day trial in District Court.

II. THE POLITICAL FAIRNESS SPIRIT UNDER WHICH THE CONNECTICUT PLAN WAS DEVISED FULLY JUSTIFIES, IF JUSTIFICATION BE NEEDED, BOTH THE TRIVIAL POPULATION DEVIATIONS WHICH HAVE NO DEMONSTRATED IMPACT ON VOTING POWER, AND THE ULTIMATE FAIRNESS OF THE PLAN

A. This Court Has Recognized That Effective Representation Is An Essential Element of the Right To Vote

Because of the unclear nature of the District Court's handling of the presumptive constitutionality issue, the essence of the case for the court below and plaintiff-appellees may be the "political fairness" issue. The issue nominally appears in two guises, but they are functionally interrelated: (1) assuming arguendo that the political fairness principle had an affirmative relationship to the level of arithmetic deviation actually achieved [14] did the resultant whole constitute a rational plan; (2) assuming no relationship, did the influence of the political fairness principle on the actual placement of district lines independently cause an impermissible impact on voting power, i.e., a gerrymander under the stringent purpose and effect tests of *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971)?

Although conceptually separate, the two points may be discussed together for the purpose of the Reply Brief. Use of a political fairness principle is a benign method to achieve nondilution of voting power. It

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[14] There is no proof in the record, absent plaintiffs' self-serving allegation adopted by the District Court. Testifying at the hearing on the aborted master's Plan James F. Collins, staff expert for the Apportionment Board, stated that in the State Board Plan the factor of political fairness did not affect the deviations; "the deviances are basically and solely related to town line cuts." *Cummings* v. *Meskill*, Transcript of Hearing on Master Plan, June 9, 1972, p. 47.

directly achieves the ultimate goal of effective representation which heretofore we have been seeking *indirectly* by focusing on gross population deviations and voting mechanisms.

The Voting Rights Act of 1965 [15] is highly relevant at this juncture. It has developed from a simple concern with equal *access* of racial minorities to the ballot box to a functional concern with the *political outcome* of the act of voting. With the aid of intervening judicial interpretation, we now have a federal statutory implementation of the political fairness principle for a group which suffered unique dilution of voting power both in initial access and result. Voting Rights Act litigation now goes beyond voting access to a concern that municipal annexations or legislative reapportionment not make politically unfair the nominally equalized opportunity to vote.[16]

In this Connecticut appeal we do not ask this Court to undertake to police all invidious impacts on voting power flowing from legislative reapportionment with the same vigor now authorized for racial minorities

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[15] 42 U.S.C. § 1971 et seq., as amended (1970).

[16] In *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), this Court held that the right to vote recognized under the Voting Rights Act of 1965 must be interpreted in the light of *Reynolds*. This compatibility was understood to include safeguards against the dilution of voting power within the context of effective representation. "The Voting Rights Act was aimed at the subtle, as well as obvious state regulations which have the effect of denying citizens their right to vote because of their race. Moreover, compatible with the decisions of this Court, the Act gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make the vote effective.'" *Id.* at 565-66. See also, *Perkins* v. *Matthews*, 400 U.S. 379 (1971).

under the shared roles of the Attorney General and the courts set forth in the Voting Rights Act. We do ask that a state through its official agencies (particularly through such a promising device as bipartisan board with tiebreaker) be permitted to seek in good faith the same kind of political fairness in the outcome of voting that is statutorily mandated for those persons within the coverage formula of the Voting Rights Act. If the state agency errs, there can be judicial correction, but it should be correction only on a developed record responsive to the issue of invidious dilution of voting power.

Elimination of gross population malapportionment blocks only one kind of voting power dilution. Use of the political fairness principle along with tight population equality not only maintains the barricade against such dilution, but erects new barricades against the present danger of voting power dilution in artfully skewed equal population districts. Political knowledge is vital here because we are now dealing with voting power dilution in the ultimate democratic sense of electing or not electing a fair share of representatives to the common forum of decision-making—the legislature.

B. Contrary To Assertions of Plaintiff-Appellees, the State Plan Operated Fairly in Its Initial Use in 1972. The State Plan Not Only Compares Favorably With All Other Plans Proposed for 1972, But Would Have Been a Distinctly Fairer Plan Than Other Plans If Used in Past Elections

Plaintiffs find the use of the Apportionment Board's political fairness principle irrational because of the asserted impossibility in defining "fairness." Brief for Appellees, pp. 35-36. Alternatively they claim that

if "fairness" is definable by election results, then the State Plan operated unfairly in 1972. *Id.* at 36-38. Neither assertion is supportable.

Political fairness is simply the avoidance of dilution of voting power by the manner in which racial or political groups are arranged in districting patterns. It is as reasonably susceptible of ascertainment in general reapportionment as in the Voting Rights Act cases, *supra.*[17] Because "the essence of the democratic system [is] the coincidence between public opinion and the government majority," [18] a politically fair apportionment plan will seek to assure: (1) that a minority of the statewide popular vote will not yield a majority of seats; (2) that the percentage of seats a party or

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[17] The following comparisons of submissions/objections under the Voting Rights Act as of December 31, 1972, were contained in a memorandum prepared by the Civil Rights Division, Department of Justice (emphasis added):

I. Potentially *dilutive* voting law changes

Type	Submissions	Objections
Redistricting (including at-large)	400	56
Annexations	599	4
Majority requirement	24	10
Numbered posts	29	17
Miscellaneous	41	8
Total	1093	95
II. Changes that potentially may deny *access* to the vote	1694	46

These figures show that questions of dilution in terms of *outcome* now constitute a significant proportion of the submissions required under the Voting Rights Act, and objections in the dilution area run at approximately three times the rate (8.7%) as compared with objections regarding access (2.7%).

[18] Duverger, *Political Parties* 391 (2d Eng. rev. ed. 1959).

district voting bloc wins is roughly proportionate to its share of statewide popular vote.

Plaintiffs' assertion that the State Plan operated unfairly in 1972, apparently to cast doubt on the Board's political fairness principle, necessitates careful scrutiny of election data. Brief for Appellees, pp. 36-38. This post-trial attack acknowledges the importance of a political fairness principle. Raising the question of the 1972 election and its relation to past elections boomerangs for plaintiffs. The following can be shown:

1. The excess seat gain for the majority party under the State Plan in the November, 1972 election would have been substantially the same under the four plans favored by the plaintiffs.

2. This "bonus effect" is attributable not to the districting plan but to the empirically derived "law of political scince" that high pluralities in landslide elections yield disproportionate seat gain for the dominant party.[19]

3. The aborted master's plan, prepared "by the numbers" with conscious *lack* of consideration of political fairness turns out to be more unfair than plaintiffs' plans or the State Plan when applied to lower house elections since 1966.

4. Comparison of the State Plan and the four plaintiffs' plans using the data of the 1966, 1968 and 1970 elections likewise demonstrates the greater fairness of the State Plan, most strikingly in re-

[19] *Id.* at 373-75. See also Miller, "One-Party Politics and the Voter," 50 *Am. Pol. Sci. Rev.* 707, 715 (1956); Schattschneider, PARTY GOVERNMENT 74-80 (1942).

gard to 1970. In that year the Democrats won a majority of seats in both houses with a minority of the popular vote.[20] All four of plaintiffs' proposed 1972 plans, and the master's plan, would have produced a minority election in 1970. Only the State Plan would have reflected the will of the people.

First, regarding the 1972 election, for the lower house the Republicans' 53.1 per cent of the popular vote yielded 61.6 per cent of the seats—93 of 151. (See Chart I, Reply Appendix, as support for such computations unless specially noted.) In the senate, the Republicans' 54.18 per cent of the popular vote yielded 63.9 per cent of the seats—23 of 36.[21] At trial plaintiffs submitted four lower house plans, only *one* of which had deviations smaller than in the State Plan. (See Pl. Exs. 20-23, Single App. pp. 178-81, 201-54; and see

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[20] Regarding the minority election of 1970, see Brief for Appellant, p. 70. Plaintiffs cannot properly claim that lack of contest for three of 177 lower house seats in 1970 so "muddied" the results as to preclude significant conclusions. Brief for Appellees, p. 36. Counting the Republican vote in the three uncontested assembly districts as zero yields a slight Democratic majority. However, by adding to the Republican statewide assembly district vote the Republican vote in the senate races for the same areas in 1970, or the normal Republican vote for districts in question in past elections, *Connecticut State Register and Manual 1969, 1971*, the lower house election produces an appropriate 5,000 vote Republican victory. However one computes the 1970 outcome, it is indisputable that the 1970 lower house election was extremely close, yet the Democrats won 21 more seats (99 to 78)! Such figures belie plaintiffs' claim that the results in 1972 were substantially less fair than in 1970.

[21] *Statement of the Vote*, General Election, November 7, 1972, published by the State of Connecticut.

Brief for Appellants, pp. 73-74.) Each of these plans likewise would have yielded 90 or more assembly seats for the Republicans in 1972. Indeed, plaintiffs' single less deviant plan (Pl. Ex. 23) would have come within a single seat of the actual outcome (92 instead of 93).

Second, the bonus effect reflects a "constant tendency" within two party systems to overrepresent the majority party; the degree of overrepresentation increases with the size of the plurality.[22] On the two occasions during the period 1966-1972 when the Connecticut plurality exceeded 50,000 votes, the winning party's representation in the legislature was disproportionate to its percentage of the statewide popular vote. In 1966 and 1968 Democrats obtained lower house majorities of 11.6 and 10.0 per cent greater than that to which they would be entitled by their share of the popular vote. Their pluralities were approximately 80,000 and 50,000 in 1966 and 1968 respectively. Similarly, in 1972 with a popular vote plurality exceeding 87,000, Republicans gained 8.72 per cent more seats than their popular vote percentage—actually a *smaller* excess seat gain than one would have expected under Connecticut's recent experience.

Third, the master's plan, which was constructed with more refined census data than was available for the other plans and had an assembly district maximum deviation from ideal of 1.16 per cent, demonstrates that a blindman's buff approach to reapportionment (eschewing consideration of political data) is not a route to fairness. In the minority election for the lower house in 1970 in which the Democrats had a minority

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[22] See note 19, *supra*.

of the popular vote (49.7 per cent) but won 55.9 per cent of the seats under the old plan, the master's plan would have almost exactly replicated the large error, giving 55.5 per cent of the seats to the Democrats. By contrast the tightest plaintiff plan (Pl. Ex. 23, 1.6 per cent deviation) would reduce the error to 52.3 per cent. The Board plan would have eliminated the error entirely and yielded 77 Republican and 74 Democratic seats.[23]

Particularly incredible in the light of the above demonstration of the fairness of the State Plan is plaintiffs' invitation to compare the State Plan's operation in 1972 *not* with plaintiffs' own plans but with the 1970 results under the old plan. Brief for Appellees, pp. 36-37. Plaintiffs find a smaller percentage disparity between popular vote and seat gain for the senate in 1970 than for the assembly in 1972—3.6 per cent v. 9.0 per cent. But this 3.6 per cent figure in that year was a burglary figure. With a minority

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[23] The shallowness of plaintiffs' complaints about use of a political fairness principle is further supported by additional observations derivable from Chart I. For the 1966-1972 period the State Board Plan would have given the Democrats 302 assembly seats to 299 for the Republicans, a percentage (50.5%) almost identical to the Democrats' total average popular vote plurality of 51.5% (36,398) over the same period. The four plaintiff plans by contrast would have yielded excessive Democratic assembly seat percentages of 54.6, 53.8, 54.0, and 53.6 percent, respectively, with the arithmetically tightest plan having the highest excess seat gain.

Further, the possible theory that observable disparities in 1966 and 1968 between seat gains under the State Plan and plaintiffs' four plans are due to competing gerrymanders is exploded by the 1970 results. The State Plan would have yielded a 77-74 Republican majority, whereas each of the plaintiffs' plans would have yielded Democratic majorities of between 5 and 11 seats in an election where the Republicans polled more votes.

popular vote of 49.15 per cent the Democrats captured 52.77 per cent of the seats! And on the lower house side in 1970 the old plan likewise converted a Democratic popular vote minority (once uncontested districts are taken into account) into a comfortable 21 seat seat margin.[24]

C. The Political Fairness Principle Is the Only State Law Principle in This Post-Reynolds Era Which Can Harmonize Fully and Effectively with the Federal Requirement of Population Equality and Prevent Intentional or Unwitting Gerrymanders

Gaffney v. *Cummings* is not a gerrymandering case. It is a case arising from an attempt to build into the reapportionment process effective safeguards *against* gerrymandering, i.e., invidious districting, both in purpose and result. The mechanism is a bipartisan board with tie breaker. The operating principles are population equality, political fairness, and minimization of town line cuts.

The political fairness principle is the basis for the plaintiffs' wild, unsupported allegations of gerrymandering. Such allegations must be put in context for they rest on a pretended lack of appreciation of the American political system, the role of parties regarding candidacies, issue formation, and legislative decision-making, and the central role of districting in providing the basis through which voting power may be fairly expressed or diluted.

It is a truism that we live under party government so far as legislatures are concerned, albeit "independents" voting for party candidates often determine

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[24] *Supra* note 20.

which candidates win or lose. Despite this obvious fact plaintiffs make the surprising assertion that the statewide total for candidates of a particular party "has no meaning at all"; is not a "rational number." Brief for Appellees, pp. 39-40. Would they still say this if the Republicans with a 51 per cent statewide plurality in an election captured all seats?

Obviously we do not know whether we have achieved politically gerrymandered or politically fair districts until we consult political data. The two questions are simply two sides of one political coin. Hence the factor of "partisan or factional advantage" [25] and the necessity of considering political data has been central both to all accepted definitions of gerrymandering, and to litigations which have probed the question. Law suits have been few both because of doubts about justiciability and because it very soon became apparent that plaintiffs could win "on the cheap," as noted in Part I of this brief, merely by showing the possibility of drawing a still tighter population equality plan, without need to prove gerrymandering. However, in the few cases which have reached the question, e.g., *Sincock* v. *Gately,* 262 F. Supp. 739 (D.Del. 1967) gerrymandering is defined, as above, in terms of explicit political unfairness, and the relevant data is party data. *Id.* at 829.

In sharp contrast to all that has gone before either in gerrymandering definition or litigation, plaintiffs' approach to gerrymandering is extraordinary. They disregard the crucial core element of unfair benefit

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[25] Baker, "Gerrymandering: Privileged Sanctuary or Next Judicial Target?" in Polsby, ed., REAPPORTIONMENT IN THE 1970s 121 (1971).

to one party at the expense of the other.[26] Because they have not and could not make such proof in this case, they offer a novel definition, accepted apparently by the District Court, See Jurisdictional Statement, pp. 10a-11a, in which mere consideration of political factors becomes gerrymandering per se. Their own footnotes refute their text, e.g. Brief for Appellees, p. 47, citing Justice Fortas' *Kirkpatrick* definition of gerrymandering as "arbitrary distortion" for "personal political purposes." 394 U.S. at 538.

What then is the role of a political fairness principle, and a corollary consideration of political data. It is simply one anti-gerrymandering standard, analogous to our former guidelines such as compactness and preserving local subdivision lines. Brief for Appellants, pp. 48-50. The latter were indirect restraints, and are largely inconsistent with a tight federal population equality rule. Political fairness is consistent with any degree of population equality and operates directly against gerrymandering, thus serving as "surrogate plenipotentiary" for the old standards.

In the light of this functional perspective on the realities of voting power dilution, the quiddities in Brief for Appellant, pp. 41-50 concerning shape, town lines, safe districts, and the undefined let alone proven "gigantic gerrymander" conceal rather than reveal the real representation interests at stake. See Brief for Appellant, pp. 70-85. Unless tied to gerrymandering claims, the first three of these points go to state law issues, not federal issues. On the town line issue, and by inference shape and safe districts as well, the Con-

[26] See Brief for Appellant, p. 85 & nn. 73-74.

necticut Supreme Court has recently ruled in favor of the State Plan, finding that it "does not violate state constitutional requirements." *Miller* v. *Schaffer,* No. 7238, 34 *Connecticut Law Journal,* No. 23, pp. 1 at 6, (December 5, 1972) amplifying the bench memorandum reported in No. 17, pp. 1 *et seq.* (October 24, 1972).

Plaintiffs have also argued that consideration of past political data, in an attempt to guard against unfair partisan advantage, is to "predetermine" the outcome of future elections. Brief for Appellees, p. 47. However, the 1972 election results under the State Plan were almost carbon copies of what would have happened under plaintiffs' plans. Chart I, Reply Appendix. The only other evidence plaintiffs offer to support this allegation is that safe seats exist under the Board Plan. This argument fails to reveal an elemental fact of reapportionment. All districting plans in *Gaffney* v. *Cummings* contain a significant and substantially equivalent number of safe seats.[27] The crucial distinction between the state plan and the alternatives is that the state plan under the political fairness principle necessarily was created with knowledge of the likely political impact of the lines drawn. Of course, all district lines have a political impact. To condemn the operation of the Connecticut bipartisan Apportionment Board would be to create a per se rule against good faith political awareness. The consequence of such a holding would be to proscribe the use of perhaps the most effective safeguard against partisan gerrymandering.

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[27] For the four elections between 1966 and 1972, the State plan yields no significantly greater percentage of safe seats (69.5 percent) than the Master's plan (70.8 percent) or the plaintiffs' four plans (70.2, 63.6, 64.9, and 64.9 percent, respectively). Chart II, Reply Brief Appendix.

A court may not wish to order a political fairness process into being and constitutional restraints could well bar such an affirmative order. But if a state chooses to avoid gerrymandering at the outset by applying a political fairness principle to the construction of districts, where can there be any federal inhibition absent plaintiff proof of actual dilution of voting power? It is sometimes hard to improve upon an opponent's Freudian slips. In this instance plaintiff-appellees seem to adopt our total position in the following comment:

> The Equal Protection Clause requires that districts be as equal in population as practicable so that one man's vote has no more numerical weight than another's. This was an important advance.
>
> But it is not enough that a *vote* be *equal*. It is more important that the vote matters.—Brief for Appellees, pp. 49-50, emphasis added.

We could not agree more. The whole focus of the Apportionment Board was on population equalization and concurrent avoidance of dilution of effective voting power.

CONCLUSION

For the foregoing reasons we reaffirm our prayer in our main brief that the judgment of the court below should be reversed and the cause remanded to the District Court with direction to enter an order dismissing the complaint of plaintiffs-appellees.

Respectfully submitted,

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APPENDIX

AFFIDAVIT OF JAMES F. COLLINS, ESQ., STAFF EXPERT, CONNECTICUT STATE APPORTIONMENT BOARD, CONCERNING ELECTION OUTCOMES, 1966-1972, UNDER REDISTRICTING PLANS PRESENTED BEFORE THE FEDERAL DISTRICT COURT IN

Cummings v. *Meskill*
341 F. Supp. 139 (1972)

The undersigned certifies that the attached tabulations (Charts I and II) represent his analysis of what the outcomes of Connecticut elections would have been during the period 1966-1972 if each election had been conducted under the various districting plans which were presented before the court in *Cummings* v. *Meskill*. A certain amount of judgment was involved in making these calculations because the voting units shaped for the district lines in the plans actually used necessarily would not correspond fully with the district lines in other plans which might have been used. However, the number of instances where there is any question concerning the outcome of a particular seat within each computation is small, affecting approximately 15 of the 151 seats, because of the existence of so-called safe voting districts which are endemic to any Connecticut reapportionment plan (see Chart II). The margin of error, therefore, is believed to be no greater than four seats (*i.e.*, plus or minus two) in each of the computations.

/s/ JAMES F. COLLINS
James F. Collins

Feb. 12, 1973
Date

STATE OF CONNECTICUT
COUNTY OF HARTFORD February 12, 1973

Personally appeared JAMES F. COLLINS, signer and sealer of the foregoing Instrument, and acknowledged the same to be his free act and deed before me in Hartford.

/s/ JANET C. LEWIS
Notary Public

My commission expires: 12/30/77.

Chart I

1966 - 1972 CONNECTICUT LOWER HOUSE ELECTIONS

Projected Outcomes Under State Plan and Alternate Plans Presented Before the Court in Cummings v. Meskill and Actual Outcomes Under Plans in Effect

Plan:	PROJECTED OUTCOMES												ACTUAL ELECTION RESULTS							
	State Board Plan (3.93%)		Plaintiffs' Ex. 23 (1.6% Plan)		Plaintiffs' Ex. 22 (7.43% Plan)		Plaintiffs' Ex. 21 (5.97% Plan)		Plaintiffs' Ex. 20 (4.08% Plan)		Master's Plan (1.16%)		Total Seats Won[3]		Percentage Seats Won[3]		Percentage Statewide Vote[3]		Statewide Plurality[3]	
Party: R = Republican D = Democrat	R	D	R	D	R	D	R	D	R	D	R	D	R	D	R	D	R	D		
1966 Seats	59	92	56	95	57	94	55	96	57	94	52	92	60	117	33.9	66.1	45.5	54.5	80,820	D
Per Cent[1]	39.1	60.9	37.1	62.9	37.7	62.3	36.4	63.6	37.7	62.3	36.1	63.9								
1968 Seats	70	81	60	91	57	94	60	91	58	93	58	86	67	110	37.9	62.1	47.9	52.1	47,935	D
Per Cent[1]	46.4	53.6	39.7	60.3	37.7	62.3	39.7	60.3	38.4	61.6	40.3	59.7								
1970 Seats	77	74	72	79	70	81	73	78	72	79	64	80	78	99	44.1	55.9	50.25	49.75	5,288	R
Per Cent[1]	51.0	49.0	47.7	52.3	46.4	53.6	48.3	51.7	47.7	52.3	44.4	55.6								
1972 Seats	93	58	92	59	91	60	91	60	90	61	85	59	93	58	61.6	38.4	52.88	46.86	87,169	R
Per Cent.[2]	61.6	38.4	60.9	39.1	60.3	39.7	60.3	39.7	59.6	40.4	59.0	41.0								

1. The plan devised in 1964-1965 under a judicially-imposed deadline was used in these elections.
2. The new plan prepared in 1971 by the State Apportionment Board was used in 1972.
3. Election result data for the 1966, 1968 and 1970 elections were compiled from the *Connecticut State Register & Manual* for 1967, 1969 and 1971, respectively. Election result data for the 1972 election were taken from *Statement of the Vote,* General Election, November 7, 1972, compiled by the State of Connecticut.
4. Allowance made for unopposed candidates.

Note: The Board Plan and all Plaintiffs' plans contained 151 seats. The Master's plan contained 144 seats. The plan used in the 1966-1970 elections contained 177 seats.

Chart II

1966 - 1972 CONNECTICUT LOWER HOUSE ELECTIONS

Projected "Safe" Assembly Districts Under State Plan and Alternate Plans Presented Before the Court in Cummings v. Meskill

Plan:	State Board Plan (3.93%)	Plaintiffs' Ex. 23 (1.6% Plan)	Plaintiffs' Ex. 22 (7.43% Plan)	Plaintiffs' Ex. 21 (5.97% Plan)	Plaintiffs' Ex. 20 (4.08% Plan)	Master's Plan (1.16%)
Number of Districts in each plan which a single party would carry in all four elections.	Rep. 53 Dem. 52	Rep. 50 Dem. 56	Rep. 45 Dem. 51	Rep. 46 Dem. 52	Rep. 47 Dem. 51	Rep. 49 Dem. 53